In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1235

GROVER WILLIAM SIMS, ETC., PETITIONER

v.

CECIL E. FOX, Brigadier General, United States Air Force, and JOHN L. MCLUCAS, Secretary of the Air Force

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner is a probationary second lieutenant in the United States Air Force. On January 24, 1973, petitioner's commanding officer, acting pursuant to Air Force Regulation 36-2 (see Pet. App. B, p. 52, n. 2), initiated proceedings for petitioner's discharge from the Air Force for committing four specific acts of indecent exposure. Such acts constitute a basis for discharge under paragraph 4(d)(4) of Air Force Regulation 36-2 (see Pet. App. B, p. 65). In his written response to the charges against him, petitioner did not deny that he had committed the acts of indecent exposure; he contended instead that he should be retained in the military on the basis of (a) his military record, (b) a favorable psychiatric report, and (c) the expunction, upon petitioner's plea of *nolo contendere* as a first offender, of the criminal charges that arose from the acts of indecent exposure. Petitioner's file, including the

materials he had submitted in his own behalf, were reviewed by his major commander, the Air Force Personnel Board, and the Office of the Secretary of the Air Force. Following that review, petitioner was ordered to be honorably discharged, with the reason for his discharge to be shown on the discharge certificate as "SDN 588, paragraph 37, AFR 36-12," which would indicate that petitioner's discharge was due to unfitness or unacceptable conduct (but not homosexuality) (Pet. App. A, p. 37).

Petitioner then brought this action in the United States District Court for the Middle District of Georgia, requesting injunctive relief on the ground that he was constitutionally entitled to a full evidentiary hearing prior to discharge. The district court dismissed the complaint (Pet. App. C). A panel of the court of appeals reversed (Pet. App. A), holding that petitioner was entitled to a hearing before being issued a discharge certificate that "carries on its face evidence of serious professional or moral misconduct such as would seriously affect his reputation and opportunity for success in civil life" (Pet. App. A, p. 38).[1]

Shortly after the panel's decision, the Air Force regulations relating to the content of discharge certificates were amended to provide that honorable discharge certificates, such as petitioner's, would not indicate the reason for discharge (that is, would not carry the legend "SDN 588, paragraph 37, AFR 36-12")[2] or suggest in any way that

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[1]The panel also held that petitioner was not required to exhaust his post-discharge administrative remedies. The court concluded that those remedies were not adequate because they would not necessarily provide the oral hearing that petitioner claimed as a matter of constitutional right (Pet. App. A, pp. 45-47).

[2]Those symbols will appear on copies retained by the Air Force for internal use. The copies furnished to the Veterans' Administration and the Selective Service System will contain a statement of the reason for discharge.

the discharge was for unfitness or improper conduct.

On rehearing *en banc*, the court of appeals reversed the panel's decision and affirmed the dismissal of the complaint (Pet. App. B). The court held that since petitioner's discharge did not deprive him of either a liberty or a property interest, he was not entitled to a full evidentiary hearing on the merits of his discharge.

As this Court noted in *Board of Regents* v. *Roth*, 408 U.S. 564, 569, "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Since the interests asserted by the petitioner are not within the Fifth Amendment's similar protection of liberty and property, the deprivation of those interests does not implicate constitutional due process.[3]

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[3]In any event, the pre- and post-discharge consideration afforded by the Air Force would have satisified any applicable due process requirements in the circumstances of this case. Since petitioner did not deny having committed the acts of indecent exposure, there was no material factual dispute. Accordingly, there was no issue appropriate for resolution in an evidentiary hearing; there was no need to present witnesses, or for cross-examination or confrontation. In these circumstances, petitioner's opportunity to submit a statement and supporting material satisfied any pre-discharge requirement of due process. *Arnett* v. *Kennedy*, 416 U.S. 134. Cf. *Federal Communications Commission* v. *WJR*, 337 U.S. 265. Following discharge, an officer can obtain an evidentiary hearing before the Air Force Discharge Review Board. 10 U.S.C. 1553. The Air Force Board for Correction of Military Records is authorized to change the character of a discharge, and the Secretary of the Air Force may reappoint a discharged officer to the service. 10 U.S.C. 1552. Accordingly, an officer has a full opportunity to clear his name following discharge, and that is all that due process requires where a liberty interest of that nature has been implicated. See *Two* v. *United States*, 471 F.2d 287 (C.A. 9), certiorari denied, 412 U.S. 931; *Reed* v. *Franke*, 297 F.2d 17 (C.A. 4).

a. It is, of course, well established that an individual possesses a liberty interest in his public reputation. Where the government proposes taking an action against an individual "that might seriously damage his standing and associations in his community * * * '* * * notice and an opportunity to be heard are essential.'" *Board of Regents* v. *Roth, supra*, 408 U.S. at 573. But no such liberty interest is present here.

The only purpose of a hearing, when proposed government action threatens to injure an individual's public reputation, "is to provide the person an opportunity to clear his name." *Board of Regents* v. *Roth, supra*, 408 U.S. at 573, n. 12. That purpose would not have been served by requiring a hearing to be held prior to petitioner's discharge, for petitioner did not dispute the allegations of indecent exposure. Petitioner did not request a hearing in order to clear his name of false charges, but rather in effect, to make a plea for lenient treatment. Due process does not require the holding of a hearing for that purpose.

Moreover, under the amended regulations, the reason for discharge will not appear on petitioner's discharge certificate; accordingly, prospective employers and other persons to whom the plaintiff might display his discharge certificate will not be able to tell that the petitioner has received anything other than a fully honorable discharge. Petitioner's discharge, therefore, has no substantial potential for seriously damaging petitioner's standing and associations in his community; it will not affect his public reputation. Although the reason for the discharge will be retained in confidential government files, the mere presence of derogatory information in such files will not deprive petitioner of his liberty interest in his public reputation.

b. Property interests "are created and their dimensions are defined by existing rules or understandings * * *." *Board of Regents* v. *Roth, supra*, 408 U.S. at 577. With respect to an individual's employment, "[n]o property interest would be conferred, for example, where the applicable statutory or contractual terms, either expressly or by implication, did not provide for continued employment absent 'cause'." *Arnett* v. *Kennedy, supra*, 416 U.S. at 167, n. 2 (concurring opinion of Mr. Justice Powell).

As a probationary Air Force Reserve officer, petitioner has no property interest in continued employment: it is expressly provided by statute that "reserve commissioned officers may be discharged at the pleasure of the President." 10 U.S.C. 1162.[4] In light of that unambiguous provision, there is no basis for petitioner's unsupported contention (Pet. 29) that "he had property interest under an 'Implied Contract' theory".[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[4]The dissenting judges below (Pet. App. B, pp. 62-70) expressed the view that petitioner had a Fifth Amendment interest in reemployment by the military that required the protection of a full evidentiary hearing. But since petitioner had no protected interest in continued employment, *a fortiori* he had no such interest in reemployment.

[5]Petitioner has, moreover, failed to make the extraordinary showing of irreparable injury that this Court requires before a probationary government employee's discharge may be enjoined. See *Sampson* v. *Murray*, 415 U.S. 61. Furthermore recent decisions of this Court demonstrate that a serviceman in petitioner's position must exhaust his administrative remedies before seeking judicial relief. *Schlesinger* v. *Councilman*, No. 73-662, decided March 25, 1975; *McLucas* v. *DeChamplain*, No. 73-1356, decided April 15, 1975. This petitioner has not done. See note 1, *supra*.